UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 16

BAY AREA HEALTHCARE GROUP, LTD. d/b/a CORPUS CHRISTI MEDICAL CENTER	Case No. 16-CA-105302

Respondent

COLUMBIA RIO GRANDE HEALTHCARE, L.P. d/b/a RIO GRANDE REGIONAL HOSPITAL	Case No. 16-CA-105309

Respondent

EL PASO HEALTHCARE SYSTEM, LTD., d/b/a LAS PALMAS MEDICAL CENTER, A CAMPUS OF LAS PALMAS DEL SOL HEALTHCARE	Case No. 16-CA-105485

Respondent

EL PASO HEALTHCARE SYSTEM, LTD. d/b/a DEL SOL MEDICAL CENTER A CAMPUS OF LAS PALMAS DEL SOL HEALTHCARE	Case No. 16-CA-105525

Respondent

and

SERVICE EMPLOYEES INTERNATIONAL UNION HEALTHCARE TEXAS

Charging Party

BEFORE THE HONORABLE JOEL P. BIBLOWITZ, ADMINISTRATIVE LAW JUDGE:

RESPONDENTS' RESPONSE TO THE GENERAL COUNSEL'S AND CHARGING PARTY'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

I.
THE ALJ'S DECISION IS PROPER AND SHOULD NOT BE DISTURBED

The Administrative Law Judge's November 21, 2014 Decision is well reasoned and based on the credible, objective evidence presented in this case. The Board should not disturb this sound decision.

Respondent Hospitals did not violate the respective collective bargaining agreements (the "Agreements") when they implemented the STD Plan in April 2013 as part of the Time Away From Work program ("TAFW") in place of the EIB Plans which had existed at those facilities. Article 38 of each Agreement provides that it would be permissible for each Hospital to implement a change in the EIB Plan during the term of the contract if (i) the Hospital provides 60 days' notice of its intent to make changes to the plan (ii) the Hospital engages in effects bargaining in connection with any change, and (iii) the change does not "result in a material and substantial decrease in the overall plan benefit." (Joint Exhibits 1-4) Administrative Law Judge Biblowitz correctly concluded that these three prongs were satisfied. He also correctly concluded that there was a "clear and unmistakable waiver" by the Union of its right to bargain over the implementation of the new STD Plan.[1]

The Exceptions filed by the General Counsel and the Union to the Administrative Law Judge's Decision focus entirely on the issue of whether the STD Plan resulted in a "substantial and material overall decrease in the overall plan benefit". Because they argue that the STD Plan

[1] It is undisputed and, indeed stipulated, that the Respondents provided the required 60 days' notice to the Union. (Tr. 23-25; Stipulations 9, 10) The Respondents also engaged in good faith effects bargaining prior to the implementation of the STD Plan on April 7, 2013. This consisted of providing the Union information about the changes that would occur under the new Plan, meeting with the Union about these changes on March 14, 2013, responding to the Union's subsequent request for additional information and agreeing to the Union's request to postpone a deadline whereby employees could elect to buy additional pay replacement for covered periods of leave under the new Plan. There is no evidence that the Union presented any formal proposals during the effects bargaining process or that Respondents rejected any Union proposal. (Tr. 26-34, 58-61, 81-82) Indeed, while the Counsel for the General Counsel stopped short of "conceding" that the effects bargaining prong was satisfied by Respondents, she acknowledged that the General Counsel is making "no allegation" in this case "of a violation or an unfair labor practice with regard to effects bargaining." (Tr. 27-28)

did result in such a "substantial and material overall decrease", they contend that there was no "clear and unmistakable waiver" of the Union's right to bargain over the change. The legal analysis offered is, however, misguided as discussed further herein.

Further, the Exceptions filed by both the General Counsel and the Union are rife with glaring misstatements of the record evidence, clever omissions of key undisputed facts and hollow, purely speculative assertions supported by no evidence whatsoever. The General Counsel and the Union had every opportunity to compile and present *tangible* evidence and data during the hearing to support their claim that the STD Plan constitutes a "material and substantial decrease in the overall plan benefit", ***yet they utterly failed to do so***. Why? Because such evidence does not exist. Rather, the *credible* and *objective* evidence and data presented by Respondents fully supports the ALJ's conclusion that the STD Plan was not a "material and substantial decrease in the overall plan benefit" but, instead, was actually a "slight increase" in the overall plan benefit. (ALJ's Decision at 11) Respondents actually contend that the STD Plan has resulted in much more than the "slight increase" recognized by the ALJ. As discussed in detail by Respondents' expert, Paul Hitchcox, the enhancements in terms of available income benefits have been significant at all four hospitals.

Indeed, the General Counsel and Union presented only two witnesses – Michael Lamond, the Director of Labor Relations for two of the Respondent hospitals (Corpus Christi Medical Center and Rio Grande Regional Hospital) was called as an "adverse witness" and Amparo Enchinton, the Union's organizer for the other two Respondent hospitals was called as the sole witness to present evidence on behalf of the General Counsel and the Union. Lamond's brief testimony merely confirmed the Respondents' fulfillment of their obligation to provide 60 days'

notice of the change and to participate in effects bargaining. His testimony further confirmed certain differences in – not disadvantages of – the STD Plan as compared to the prior EIB Plans.

The testimony of Union representative Enchinton was stunning in its lack of substance. She provided absolutely no data or other evidence as to how the STD Plan has actually affected bargaining unit members in either a positive or negative manner. Other than offering irrelevant testimony about her own personal leaves under the prior EIB Plan during her pre-2010 employment at one of the Respondent hospitals, she referenced ***only one*** bargaining unit member (out of the 1564 employees who were eligible for the STD Plan) who she believes has been "denied" leave under the new STD Plan. (Tr. 67-68) On cross-examination, however, Enchinton acknowledged that she has no knowledge of the actual documentation submitted by this one employee in seeking leave. (Tr. 100-101) Subsequent testimony from one of Respondents' witnesses, Charlene Jones, confirmed that the employee to whom Enchinton referred had actually submitted no documentation at all supporting a leave request under the STD Plan. (Tr. 124-125) The remainder of Enchinton's testimony provided absolutely no support for the position of the General Counsel and the Union that the STD Plan has disadvantaged bargaining unit employees.

In contrast to the General Counsel's speculative no evidence presentation of "what if?" and "maybe?", the Respondents presented concrete evidence in the form of credible testimony and objective data demonstrating that the STD Plan implemented in April 2013 has, in fact, been an overall enhancement to the overall plan benefit for the bargaining unit employees at these facilities. The ALJ properly relied on the comprehensive report and analysis offered by

Respondents' expert, Paul Hitchcox, in Employer Exhibit 1 which provides numerous examples of these enhancements.[2]

For example, the STD Plan provides employees up to 20 weeks of coverage for ***each*** qualifying event. Under the prior EIB Plans, an employee could only utilize EIB hours they had actually accrued over time to cover eligible leaves. Once those EIB hours were exhausted, the employee had to accrue more hours in his or her EIB bank in order to be able to rely on EIB coverage again in the future. Once the employee's EIB hours were exhausted, the employee was left to rely on his or her accrued PTO hours in order to have paid leave. If the employee had no available PTO, the leave would be unpaid.[3]

At the time of the implementation of the STD Plan in April 2013, less that 8% of the employees (123) at the four Respondent hospitals had 20 weeks or more of available EIB. Indeed, 46% of the employees (729) had less than 6 weeks of available EIB. *More than 10% of employees (161) had no available EIB hours at all.* (Employer Ex. 1, p. 6) Not only did the implementation of the STD Plan automatically provide these bargaining unit employees with a vested 20 weeks of available paid leave time, but this was a "per occurrence" 20 weeks of leave. (Employer Ex. 1, p. 2) That improvement, alone, is significant.

Further, the actual payouts for covered leaves since the implementation of the STD Plan have far exceeded what employees would have received under the EIB plans at their respective

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[2] Mr. Hitchcox discussed his qualifications during the hearing. He is an actuary with more than 34 years of experience. He is a Fellow of the Society of Actuaries and a Member of the Academy of Actuaries. He has provided consulting services to the Respondent hospitals regarding the development of the Time Away From Work program and, in particular, the STD Plan. He is also familiar with the parameters of the prior EIB plans at the hospitals. (Tr. 141-143) While the Union and the General Counsel have attempted to point out issues that Mr. Hitchcox was not asked to review (GC's Exceptions Brief, pp. ; Union's Exceptions Brief, pp.), they have not challenged the accuracy of the data he presented, nor have they presented their own data on any aspect of the STD Plan.

[3] The only exception would be for those employees who had chosen to purchase – at their own expense – short term disability insurance. In those cases, those employees would receive some pay replacement for some period of time depending on the level of coverage they chose and paid for themselves. This was not a hospital paid benefit It should be noted that after the implementation of the STD Plans, nothing prevented employees from, continuing to purchase their own supplemental or additional short or long term disability policies. (Tr. 139-140)

hospitals. At Rio Grande (RGRH), the STD Plan has paid a total of 229.4 weeks of leave to 42 employees. This is 99.2 weeks more than would have been paid under the EIB Plan which equates to 76% longer duration of income protection. (Employer Ex. 1, p. 8) At Del Sol (DSMC), the STD Plan has paid a total of 356.5 weeks of leave to 52 employees. This is 181.3 weeks more than would have been paid under the EIB Plan which equates to 104% longer duration of income protection. (Employer Ex., p. 10) At Las Palmas (LPMC), the STD Plan has paid a total of 210.7 weeks of leave to 34 employees. This is 97.5 weeks more than would have been paid under the EIB Plan which equates to 86% longer duration of income protection. (Employer Ex. 1, p. 12) Finally, at Corpus Christi Medical Center (CCMC), the STD Plan has paid a total of 319 weeks of leave to 47 employees. This is 188.7 weeks more than would have been paid under the EIB Plan which equates to 145% longer duration of income protection. (Employer Ex. 1, p. 14)[4] The ALJ properly relied on this compelling data which clearly demonstrates the very real increase in benefits brought about by the STD Plan.[5]

II.
STANDARD OF REVIEW

When reviewing an Administrative Law Judge's decision, the Board is bound to base its decision on evidence contained in the record. *Bally's Park Place, Inc. v. NLRB*, 646 F.3d 929 (2011) Further, as the Union correctly acknowledges, the Board is entitled to reach a "result contrary to that of the [ALJ]" only when there is "substantial evidence in support of each result".

[4] These numbers are based on benefits paid from the inception of the STD Plan on April 7, 2013 through April 6, 2014. (Employer Ex. 1, pp. 8, 10, 12, 14)

[5] The Union's statement that the "actuarial analysis itself shows a sharp decrease in leave coverage upon implementation of the new plan" is gross misstatement of the record. (Union's Brief, p. 7) To the extent this is an effort by the Union to attack Mr. Hitchcox's analysis based on a review of the underlying data which was provided to the General Counsel following the hearing, it is improper and untimely. The ALJ granted the General Counsel's request that Mr. Hitchcox provide his underlying data for review and Mr. Hitchcox complied with that request. The General Counsel had the opportunity, per the ALJ's instruction, to seek to re-open the record if any variance was noted upon review of that data. (Tr. 182-182) The General Counsel made no such request and cannot, now, attempt to challenge Mr. Hitchcox's analysis based on a review of that data.

Id.[6] In this case the record evidence presented by the Respondents, as referenced herein and in Respondents' earlier Brief was significant and undisputed. The ALJ's Decision accurately summarized and cogently analyzed that evidence. The conclusions reached by the Arbitrator -- that there was no "material and substantial decrease in the overall plan benefit" and that the Union did clearly and unmistakably waive its right to bargain about the issue -- were fully supported by the record evidence. The Exceptions filed by the Union and General Counsel should be denied and the ALJ's Decision should not be disturbed.

III.
RESPONDENTS' RESPONSES TO SPECIFIC EXCEPTIONS

A. Exceptions to ALJ's Finding that STD Plan Does Not Constitute a "Material and Substantial Decrease To the Overall Plan Benefit"[7]

The General Counsel's Exceptions (1, 2, 3, 4, 5, 6, 8, 9) and the Union's Exceptions (A, B, C, D, E, F, G) addressed in these sections are generalized and essentially overlapping in nature in that they simply assert that the ALJ's Decision was wrong based either (i) on its failure to consider "multiple significant disadvantages" of the STD Plan or (ii) on its "acceptance of hypothetical advantages" of the STD Plan. As a result, the General Counsel and the Union conclude that there was no "clear and unmistakable waiver" of the right to bargain. Their attacks on the ALJ's conclusions are, however, simply not supported by the record.

1. The Elimination Period

The General Counsel and the Union continue to focus considerable attention on the one week elimination period under the STD Plan as a significant disadvantage of the new plan, however, this is not the case. (Union's Brief, pp. 4, 9) Under the EIB Plan, the elimination or

[6] The Union's reference to the Katz case is inapposite. That case did not involve any waiver or alleged waiver of the Union's right to bargain over the terms at issue.

[7] See, Union's Exceptions A, B, C, F, G and General Counsel's Exceptions 1, 2, 3, 4, 5, 6, 8. Several of the "Exceptions" presented by the General Counsel and the Union in their respective Briefs overlap or are seemingly redundant. They are grouped together, as appropriate, in this Response.

"wait" period at RGRH and CCMC was 24 hours which is the equivalent of three 8 hour shifts or two 12 hour shifts. The EIB elimination period at DSMC and LPMC was 16 hours which is the equivalent of two 8 hour shifts or 1.33 12 hour shifts. Under the STD Plan, the elimination period is not measured in hours, but instead is one work week. (Employer Ex. 1, p. 2) Thus, for a 12 hour shift employee who normally works three shifts per week, the elimination period at RGRH and CCMC only increased by one shift, and it only increased by just over one and a half shifts at the other two hospitals. For 8 hour shift employees, the elimination period increased by two shifts or three shifts, respectively at RGRH/CCMC and DSMC/LPMC. (Tr. 151-152) While this is a change, it is certainly not a "material and substantial decrease in the overall plan benefit" considering the other data presented and relied on by the ALJ regarding the increased available leave time for so many bargaining unit employees. (Employer Ex. 1, pp. 6-14)

The discussion of the elimination period in the Exceptions Briefs is a perfect example of the General Counsel's and Union's reliance on speculation, rather than objective evidence. There is no evidence at all to support the Union's assertion in its Exceptions Brief (pp. 9-10) that new employees "may not have accrued sufficient PTO to cover the elimination period … resulting in no income during that period." Nor was any evidence offered by the General Counsel to support a finding that *any* employee has been actually disadvantaged (i.e. received no income replacement or had to rely on PTO) by the fact that the STD Plan does not provide for waiver of the elimination period in the event of hospitalization. Absent any such evidence, and in view of the overall advantages referenced herein and during the hearing, the ALJ's finding was sound.

2. Maternity Leave

The discussion of maternity leave in the Union's Brief provides a further example of what can only be viewed as deliberate misstatement of the record in this case. The Union cites to only a portion of Mr. Lamond's testimony for its assertion that employees "could take up to 12 weeks of maternity leave (including for "bonding")" under the prior EIB Plans. (Union's Brief, pp. 4, citing to Tr. 43) However, as Mr. Lamond made clear during his testimony, "new baby bonding care" was ***not*** available at any of the hospitals under the EIB Plans. (Tr. 47-48)[8] Mr. Lamond's undisputed testimony further confirms that the process for taking maternity leave in terms of the requirement for medical certification is the same under the STD Plan as it had been under the EIB Plans. (Tr. 47-48) This was also confirmed by Mr. Hitchcox. (Tr. 151-152)

Indeed, the STD Plan is actually a *better plan* for the vast majority of bargaining unit employees when it comes to maternity leave because most employees did not have 12 weeks, let alone 20 weeks of accrued EIB time available. This is aptly illustrated in the Hitchcox analysis which shows that of the 27 employees who took maternity leaves during the first 12 months of the STD Plan, only 4 would have had enough EIB hours accrued to cover their leaves. The other 23 employees were able to take longer paid leaves under the STD Plan than they would have been under the former EIB Plans. In fact, one employee at CCMC who had no EIB at all was able to take a six week leave under the STD Plan. (Employer Ex. 1, pp. 9, 11, 13, 15)

3. Intermittent Leave

The Union's Brief (p. 4) argues that intermittent leave is not covered by the STD Plan and, thus, the finding that there was no "material and substantial decrease in the overall plan

[8] Mr. Lamond acknowledged that, under the old EIB Plan at CCMC, an employee could take up to 80 hours of dependent care leave, if there was a medical certification and if the employee had those hours accrued in their EIB bank. However, this is not the same thing as "new baby bonding" time as that term has been used by the Union. "Bonding" time was not available at any of the hospitals under the EIB Plans. (Tr. 47-48)

benefit" is erroneous. This argument is unpersuasive. To begin with, an employee under the old EIB Plans could only conceivably receive income replacement for intermittent leave based on the number of hours he or she had in accrued EIB hours. Thus, for at least 10% of the employees who had no EIB balance, there was no paid intermittent leave available. (Employer Ex. 1, p. 6)

It is also important to note that intermittent leaves are often taken by employees who need to attend periodic treatments or physician appointments for a day or even less than a full day. Because many of the bargaining unit employees work only three days per week (and none work seven days a week), it is quite often possible, as a practical matter, for those employees to schedule appointments or treatments on days when they are not otherwise scheduled to work making the need for paid time off unnecessary or infrequent.

Finally, the issue of intermittent leave is speculative at best and simply does not rise to the level of a "material and substantial decrease in the overall plan benefit". This is especially true given that the General Counsel and the Union presented no evidence whatsoever of any particular employee who has experienced a loss in pay or an inability to take a needed leave on an intermittent basis since the implementation of the STD Plan.[9]

[9] Moreover, the General Counsel's reference to intermittent leave and discussion at page 11 of its Brief is a complete misrepresentation of the data in the record. The General Counsel suggests that "up to 292 leaves annually that may have been covered under EIB are no longer covered under TAFW." (emphasis added) This is a gross misinterpretation of the data and Mr. Hitchcox's testimony and has absolutely nothing to do with intermittent leave. The fact that there happened to be fewer leave requests submitted overall during the first year of the STD Plan establishes nothing about whether any single employee was disadvantaged by not having the availability of paid intermittent leave. Further, the fact that there were fewer leave requests submitted says nothing about the benefits available to employees who did submit leave requests under the STD Plan. Indeed, as demonstrated by Mr. Hitchcox in his testimony and in Employer Exhibit 1, the vast majority of employees who did take leave under the STD Plan were able to take longer leaves and receive greater income replacement duration than had they been subject to the prior EIB Plans. (Employer Ex. 11, pp. 8-15) The Union's similar discussion on this topic is likewise unpersuasive. (Union's Brief, pp. 11-12) Finally, neither the Union, nor the General Counsel presented any evidence from which the ALJ could conclude that the drop in the number of leave requests was caused by the implementation of the STD.

Absent evidence of an actual negative impact to even a single employee in connection with the issue of intermittent leave, the suggestion that the ALJ should have reached a conclusion different than he did on the overriding issue of "material and substantial decrease" is illogical.

4. Alleged Delayed Payments

The Union's suggestion that the STD Plan has resulted in "delays" in payments to employees on covered leaves is another example of a purely hypothetical assertion unsupported by any evidence. (Union's Brief, pp. 4, 8) The Union's citation to the transcript (Tr. 40-41) does not provide any support at all for this assertion and there is none in the record. To the contrary, the evidence presented by Respondents established that there have been no payment delays other than in a situation where medical documentation was not submitted. (Tr. 117)

5. Placement on "Unpaid Status"

The Union argues that employees who are on STD leave are placed on "unpaid status" and receive their pay replacement checks from a third party administrator. The Union complains about this because it means that during periods of covered STD leave, employee deductions for any 401k contributions, health insurance and union dues cannot be taken. (Union's Brief, pp. 7-8)[10] The Union fails to mention, however, that under the prior EIB Plans, employees who had no EIB or inadequate EIB were also placed on "unpaid status" unless they chose to use available PTO. Thus, the exact same situation would result where those employees would be required to make payments by check for their health insurance premiums and union dues and they would not have 401k contributions deducted. (Tr. 49, 120-121)

Ms. Jones confirmed (i) that there is no increase in insurance premiums while an employee is on STD leave (Tr. 119) and (ii) that no employee has had a cancellation of insurance

[10] Ms. Jones explained that the insurance company issuing the STD checks is not able to take deductions from the leave checks for health insurance premiums or 401k contributions. (Tr. 122-123)

coverage due to non-payment or late payment of a premium since the implementation of the STD Plan. (Tr. 119) In addition, she explained in some detail how an employee who takes STD leave can "catch up" on 401k contributions by increasing his or her contribution level upon return from leave. (Tr. 121-124)

Once again, the Union and General Counsel did not present any evidence that any employee was actually negatively impacted by this procedure (i.e. the third party checks without deductions) under the new STD Plan. Absent such evidence, the ALJ had nothing on which to base any conclusion that this procedure was a "material and substantial decrease in the overall plan benefit."

6. Part-Time Employees

The General Counsel states that the ALJ's finding that the EIB Plans did not apply to part-time employees is "contrary to the record evidence". (General Counsel's Brief, p. 10) This is just not accurate and is another example of a misstatement of the record. Indeed, the record evidence is clear that the former EIB Plans only allowed accrual of EIB by full time employees. (Stipulations 12-14; Employer Ex. 1, p. 3) RGRH did allow for part-time employees to use EIB hours they had accrued during any period of time they had been employed on a full time basis, but they could not accrue additional EIB hours while in a part-time status. (Stipulation 13)

The fact of the matter is that the coverage of part-time employees under the new STD Plan was a material improvement for those employees at all four hospitals and a clear enhancement of the overall plan benefit. The ALJ's observation of this fact was correctly based on the evidence.

7. Employees With More Than 20 Weeks of EIB

The General Counsel contends that the ALJ's Decision "ignored" the evidence that 123 employees had "in excess" of 20 weeks of EIB coverage at the time of the implementation of the STD Plan. (General Counsel's Brief, p. 10) As an initial matter, the General Counsel's mathematical calculation is wrong and its representation that this amounts to "nearly 15% of Respondent's employees" is inaccurate. The number of employees eligible for the STD Plan at the time of implementation was 1564. (Employer Ex. 1, p. 5) Thus, *fewer than 8%* of that group had "in excess" of 20 weeks of EIB hours available.

Further, the ALJ did not "ignore" this evidence – it is specifically referenced at page 10, lines 43-44 of the Decision. Rather, the ALJ logically focused on the fact that a much larger percentage of the employee population – approximately 46% had less than 6 weeks of available EIB, and over 10% had no EIB hours available at all. The ALJ's conclusion regarding this evidence is sound.

B. Exceptions to ALJ's Finding Regarding the Increased Expense to Respondents Under the STD Plan

The Union and General Counsel complain that the ALJ improperly relied on the actual cost to Respondents of the STD Plan in concluding that the Plan is not a "material and substantial decrease in the overall plan benefit" and that it is "slightly better" for employees. (Union's Exception H, General Counsel's Exception 7) This complaint simply ignores the careful analysis set forth in the Decision. While the ALJ correctly referenced the undisputed evidence that the cost to Respondents of the STD Plan was higher than what would have been expected under the EIB Plans, it is clear that this was not the sole basis for his Decision. Rather, the Decision carefully lays out and objectively analyzes the various changes and enhancements

based on the record evidence. The well reasoned conclusion reached by the ALJ was clearly based on that overall analysis.

C. Exceptions to ALJ's Finding That There Was "Clear and Unmistakable Waiver of Union's Right to Bargain Over Change in EIB Plans[11]

The General Counsel now argues that there was no "clear and unmistakable waiver" by the Union because the contract language in Articles 38 was not specific enough and because the language "material and substantial decrease in the overall plan benefit" is, in the General Counsel's view "subjective". (General Counsel's Brief, pp. 13-15) These arguments are simply not persuasive, nor are they supported by legal authority.

It is hard to imagine how the contract language could have been any more specific. The heading to Article 38 in each of the Agreements was "Plan Modification" which unambiguously indicates that it covered the scenario whereby the Respondents would have the right, *without bargaining*, to implement changes to the EIB Plans. The language of the Article itself clearly and unambiguously describes the prongs to be satisfied by Respondents in order to implement modifications. The Union did not put on any evidence at all of bargaining history related to this Article, so there was no basis for the ALJ to conclude, particularly given the clear language of the Article, that the Union had done anything other than "consciously yield" and "clearly and unmistakably waived its interest in the matter." (General Counsel's Brief, p. 14)

As to the issue of "subjectivity" the argument presented by the General Counsel should also be rejected.[12] The terms "material" and "substantial" are not difficult ones to understand. Merriam-Webster's Online Dictionary defines "material" as something "having real importance

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[11] See Union's Exceptions D, E and General Counsel's Exception 9.

[12] The single case cited by the General Counsel on the issue of "subjectivity" is not analogous. In that case, the subject contract language referred to other plans "generally" available. *Trojan Yacht*, 319 NLRB 741 (1995) That language did not, as is the case here, set out a clear standard by which the Employer's implementation of a change could be reviewed and measured.

or great consequences". The term "substantial" is listed as a synonym of "material". The term "substantial" is defined as "large in amount, size or number".[13] No evidence was presented to suggest that the Union was confused by or unfamiliar with these simple terms. Respondents submit that the use of both terms together, as opposed to just one, only serves to emphasize that the clear and unmistakable intent of this language was to allow the hospitals the latitude to make changes to or replace the EIB Plans as long as the changes did not result in a large, substantive and consequential decrease in the "overall plan benefit". In other words, the contract language agreed to by the Union makes clear that the Respondents had the right to make changes to or even replace the EIB Plans if they chose to do so. Moreover, even some decrease in the benefits to a particular employee or employees in particular situations would be permissible, as long as those decreases did not result in a "material and substantial decrease in the overall plan benefit." The bottom line is that the language "material and substantial decrease in the overall plan benefit was intended to and clearly does require some significant, quantifiable and far reaching change which works to the disadvantage of the majority of the bargaining unit employees. As discussed, *infra,* the General Counsel and the Union have presented no such evidence in this case and the ALJ's Decision should be upheld.

IV.
CONCLUSION

The ALJ's Decision is proper and clearly supported by the substantial evidence presented by Respondents. There is no basis upon which the Board can properly disturb this Decision. Accordingly, Respondents ask that the Exceptions filed by the Union and the General Counsel be denied in all respects.

[13] See, Merriam-Webster Online Dictionary, www.merriam-webster.com

Respectfully submitted,

/s/ Nancy L. Patterson

Nancy L. Patterson
State Bar No. 15603520
Morgan, Lewis & Bockius LLP
1000 Louisiana, Suite 4000
Houston, Texas 77002
(713) 890-5000 - Telephone
(713) 890-5001 - Facsimile

ATTORNEYS FOR RESPONDENTS

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing was forwarded via e-mail to:

Eva C. Shih
National Labor Relations Board
Region 16, San Antonio Resident Office
615 E. Houston Street, Suite 559
San Antonio, Texas 78205
eva.shih@nlrb.gov

Manuel Quinto-Pozos
Deats Durst Owen & Levy, P.L.L.C.
1204 San Antonio Street, Suite 203
Austin, Texas 78701-1870
mqp@ddollaw.com

/s/ Nancy L. Patterson
Nancy L. Patterson

DB1/ 82463953.1